IN THE HIGH COURT OF JUDICATURE AT BILASPUR
(C.G.)

W.P. NO. 1651/2003 Single Bench

Petitioner :Manrakhan.S/o.Shri.Jhadu Shirdar aged about 52 years, occupation agriculturist, R/o. village Belgaon Tehsil Dongargarh District Rajnandgaon.

Versus

Respondents :

1. S.D.O. P.H.E. Dongargarh, District Rajnandgaon.
2. Chief Executive Engineer. P.H.E Chui Khadan.
3. State of Chhattisgarh. Through Collector, Rajnandgaon.

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT OF CERTIORARI, WRIT/WRITS DIRECTION / DIRECTIONS ORDER/ORDERS.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION No. 1651 OF 2003

Manrakhan

Versus

S.D.O., P.H.E., Dongargarh and others

O R D E R

Post for 7-7-2003

Sd/-
Fakhruddin
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION No. 1651 OF 2003

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Versus

S.D.O., P.H.E., Dongargarh and others

Smt. Hameeda Siddiqui, counsel for the petitioner.

Shri Rajesh Pandey, G.A. for the State.

O R D E R

Hon'ble Fakhruddin,J

Heard learned counsel for the parties.

2. This petition is directed against the order dated 2-9-1996 passed by the Civil Judge Class I, Dongargarh in Civil Suit No. 42 A/95.

3. It is submitted by the learned counsel for the petitioner that the petitioner has filed a suit for permanent injunction against the respondents on the ground that the construction of minor canal over the suit land is illegal and without authority. It is further submitted that for the purpose of construction of canal neither the property of the petitioner was acquired nor compensation was given nor consent was obtained by the respondents. The respondents contested the suit and filed

written statement stating that the applicant/plaintiff had given consent on 4-4-1994 for the construction of the canal.

4. Learned counsel for the petitioner submits that two applications were filed; one under Order 26 Rule 9 C.P.C. for appointment of Commissioner and another under Order 6 Rule 17 of C.P.C. for amendment. Both the applications were rejected by order dated 2-9-1996. Against the said order a revision was filed being Civil Revision No. 2042/1996. A show cause notice why the revision be not admitted was issued vide order dated 28-10-1996 and proceedings were stayed. Thereafter the State of Chhattisgarh was formed and the matter was transferred to this Court by the High Court of M.P. The revision was dismissed by this Court vide order dated 2-4-2003 as not maintainable in view of the new amendment in Civil Procedure Code. Then the present petition has been preferred by the petitioner challenging the said order.

5. Learned counsel for the petitioner submitted that the appointment of Commissioner was prayed on the ground that the proposed and real construction of the canal is different and the construction will destroy the property. It is further submitted that there is an alternate way for construction, which is less expensive. The matter is pending and the proceedings are stayed.

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6. So far as appointment of commissioner is concerned, the matter is well settled. In the case of Smt. Uttamibai –v- Chhaganlal reported in 1974 M.P.L.J. Note 65, where the case of ejectment was based on the ground of encroachment, it was held that the question could not be obviously determined without a local investigation by appointment of Commissioner. In Durga Parsed –v- Parveen Foujdar and others reported in 1975 M.P.L.J. 801 the Court in para 25 of the judgment has held that in cases where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in the absence of an agreed map, except by the appointment of a Commissioner under Order 26, Rule 9 of the Code of Civil Procedure.

7. In the case of Mangilal and another –v- Cahrishankar and another reported in AIR 1992 M.P. 309, in para 14 of the judgment, the Court has held that:-

> "The trial Court, therefore, had rightly proceeded in appointing the commissioner for local investigation. Even if the prayer for such appointment would not have come from the parties, the trial court itself would have been justified to make that order under O. 26 R. 9 CPC"

8. In the case of Mahendranath –v- Purnananda reported in AIR 1988 Orissa 248, the Court has dealt with the Order 26 Rule 9 C.P.C. Relevant part of Paragraph 4 is quoted below:

> "4. .....No doubt, the provision confers a discretion on the Court. But the discretion, as it is well known, has to be exercised in a judicious and sound manner but not whimsically and capriciously. What is necessary to note in

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the provision is the expression 'deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute....' Therefore, where the Court considers a local investigation to be requisite and proper, ordinarily it should not decline to exercise jurisdiction. It may decline jurisdiction if the motion is made at a belated stage or if the motion is mala fide or in circumstances justifying refusal. A party has choice and a right to examine a survey knowing person after getting the identification or measurement privately done by him. For examining such witness it does not seek any privilege or indulgence.

Where the controversy between the parties is the area of the land or identification or location of an object or the land, local investigation is necessary, essential, requisite or proper. It will not be a sound exercise of discretion without anything more to decline to appoint a commissioner. Very often decision of a case turns on the identification or determination of the area and evidence in relation thereto from its peculiar nature can only be had on the spot. In such cases local investigation and measurement are essential. Evidence in respect thereof can be laid by engaging a person qualified to conduct the investigation and measurement privately. ....."

Paragrah 5 of the judgment is also relevant and quoted below:-

"5. When the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal. Hence, ordinarily in such type of cases local investigation should not be deferred to a stage after the closure of evidence. I do not mean thereby that in no circumstances can local investigation be sought after the evidence is closed. But ordinarily it should be done before the parties adduced evidence....."

9. Having thus considered, so far as the order rejecting the application for appointment of Commissioner is concerned, that is set aside. It is directed that a suitable person be appointed as Commissioner to make local investigation and to submit report.

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10. So far as amendment is concerned, the Court below has considered the matter and found that the amendment sought for is such which changes nature of the suit. Therefore, so far as this part of the order is concerned, no case for any interference in exercise of jurisdiction vested to this Court under Article 226 is made out. However the petitioner may raise the ground in appeal if such an eventuality arises.

11. In the result, the writ petition is partly allowed.

Sd/-
Fakhruddin
Judge